NOS. 82-1312, 82-1345, 82-1346

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

UTAH POWER & LIGHT COMPANY, *et al.*,
Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION, *et al.*,
Respondents

ALABAMA POWER COMPANY, *et al.*,
Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent

PACIFIC GAS AND ELECTRIC COMPANY, *et al.*,
Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION OF RESPONDENT CITY OF BOUNTIFUL, UTAH

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QUESTION PRESENTED

Whether the United States Court of Appeals for the Eleventh Circuit was correct in affirming the decision of the Federal Energy Regulatory Commission that Section 7(a) of the Federal Power Act, 16 U.S.C. §800(a), requires that when the plans of a nonpreference original licensee and the plans of a state or municipality competing for a new hydroelectric license are "equally well adapted, to conserve and utilize in the public interest the water resources of the region," the tie shall be broken in favor of the preference applicant.

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REASONS WHY THE WRIT SHOULD BE DENIED

Respondent, the City of Bountiful, Utah, respectfully requests that this Court deny the petitions for a writ of certiorari, seeking review of the Eleventh Circuit opinion reported at 685 F.2d 1311.

The issue sought to be raised by the petitions is certainly not "insignificant." However, it is a narrow issue of pure statutory interpretation on which there is no reason to suspect that the decision of the court of appeals is incorrect. Given the more meritorious and more significant matters upon which review by this Court are being sought, the decision of the court of appeals below does not warrant further review.

Four commissioners of the Federal Energy Regulatory Commission, after extensive briefing and argument, have rejected the petitioners' views. Three judges of the court of appeals have rejected their position and the entire court has found the petitioners' views unworthy of reargument. In a 1922 decision in *Alabama Power Co.* v. *Gulf Power Co.*, 283 F. 606, 617 (M.D. Ala.), District Judge Clayton, who was in a unique position because of his prior role as a congressional leader during much of the formative period of the legislation, forthrightly stated that the "state or municipality under Section 7 is given the preferential right over the original licensee to a renewal of the license." No judge, commissioner, or any other holder of a presidential commission has ever in a litigated decision found merit in the petitioners' views. It is only through gross distortion of the record and of the holdings of the court of appeals and of the Commission that the petitioners have been able to present even a facially appealing argument that their position may have merit.

In attempting to escalate the impact of the decision below, the Hydro Group indicates that "its principal result will be only that the customers of the original licensees will lose the existing benefits from the projects, for which they have paid the amortization charges" (Pet. at 11).[1] That contention, of course, erroneously assumes that the same customers who paid amortization charges for an average of well over 55 years will continue to exist through the next 55 years. PG&E also urges that loss of the projects "*could*" (emphasis added) impose upon the affected utilities "additional costs of replacing their hydroelectric capacity with new fuel-burning facilities (Pet. at 9).

[1] The Petition of the 33 private power companies filed under the caption of Alabama Power Co. *et al.* will be referred to as Hydro Group Pet., the Petition of Pacific Gas and Electric Company and Wisconsin Power & Light Company will be referred to as PG&E Pet., the Petition of Utah Power and Light Co. and the Montana Power and Light Co. will be referred to as the Utah Power Pet., the opinion of the Federal Energy Regulatory Commission ("FERC" or the "Commission") 11 FERC ¶ 61,337) will be cited as reproduced in the separately bound appendix to the PG&E Pet. (PG&E Pet. a), and the Joint Brief of the intervening public power entities to the court of appeals, filed October 5, 1981 will be referred to as the Joint Brief.

But, in many if not most instances, a municipality obtaining the new license will have previously bought all or the great part of its capacity from the utility holding the original license and, thus, there will be no need to replace the hydroelectric capacity. In any event, the total amount of capacity needed by the region will be unchanged by any outcome of a relicensing proceeding. PG&E also seeks to imply that the loss of hydroelectric projects will, because of their current integration into the existing owner's systems, result in a failure to "realize maximum efficiency" (*id.*) In the extremely rare instance when a loss in efficiency would result from a cause other than the refusal by the original licensee to permit the continued integration of the recaptured hydroelectric project with its other hydroelectric projects for maximum overall efficiency this impact can certainly be considered by the Commission as an aspect of its public interest finding.

For preference to act as a tie-breaker, as the Commission held, there must first be a tie between the plans of the applicants. They must, in the language of Section 7(a) of the Act be "equally well adapted, to conserve and utilize in the public interest the water resources of the region." The Commission in its opinion stated that its decisions in competitive relicensing cases would take into account "the public interest in its broadest sense." (PG&E Pet. 79a) Although the Commission has not yet issued a new license in a competitive relicensing proceeding, it must be assumed that it will carry out the law and that the result of its decision will be in accord with the public interest. It is certainly premature to seek review by this Court based upon a belief that the Commission will not carry out its duties.[1]

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[1]The Motion and Brief as Amicus Curiae of the Public Utilities Commission of the State of California In Support of Petitions is typical of those filed by other state commissions. As the California PUC candidly states (at 9), it is the "duly authorized representative" of customers of "privately-owned utilities." It neither regulates nor represents customers of publicly-owned utilities. It therefore can hardly be termed a representative of the overall public interest.

A. Plain Meaning Requires The Court's Conclusion

1. The Commission's interpretation is the plain meaning of Section 7.

The Commission found the words "in issuing licenses" to new licensees under Section 15 must mean "in determining whether to issue licenses" to new licensees under Section 15. Since, in every competitive licensing situation one of the choices before the Commission must be the issuance of a license "to [a] new" licensee, this means that the preference will be applicable to all competitive relicensing proceedings.

On this – the crucial – point, the Commission held (PG&E Pet. 63a n. 44, emphasis added):

> In certain places in the FPA the reference to the issuance of licenses is troublesome if restricted literally to the ministerial act of issuance. In Opinion No. 36-A (*Escondido Mutual Water Company, et al.*, Project No. 176), for example, we said, at 21, that the reference in Section 4(e) to the issuance of licenses "within any reservation" would not be construed literally to refer to a Commission vote upon the issuance of a license when the members of the Commission are physically within a reservation. So, too, the reference in Section 7(a) to "issuing licenses" should not be restricted to the ministerial act of issuance. *Since the Commission is required to make certain findings either before or in conjunction with its vote on the issuance of a license, the reference in Section 7(a) to "issuing licenses" should include the overall consideration of applications for licenses. And in that context, the more-inclusive phrase "in issuing licenses to new licensees" would mean simply "in* considering *applications of new licensees," or, as Santa Clara argues (supra, at note 15), "in determining whether to issue licenses to new licenses."*

This interpretation was the sole plain meaning interpretation urged upon the court of appeals both by the Commission and by the public power entities. It was, therefore, the interpretation

which the court of appeals determined to be reasonable when it found (PG&E Pet. 9a), "the public companies here have accorded one reasonable interpretation to the words 'new licensees' by relying on its context in Section 7(a) . . . ."

It is important to recognize that the public power entities in their Joint Brief to the court of appeals commented upon and challenged the failure of the private companies to provide any interpretation of "in issuing" that would support the plain meaning argument advanced by the private companies (*e.g.*, Joint Brief at 15, 20). The private companies were unable or unwilling to do so in their reply briefs to the court of appeals and have continued to totally ignore the Commission's position, found reasonable by the court of appeals, in their petitions here.

The Commission's reading is demonstrably correct and compelled by the language of the Act. The words "in issuing" must refer to the process of considering applications rather than the conclusion of the process – the act of issuing the license. This is clear when we consider the situation in which all parties agree that the municipal preference is applicable–a contest between two applicants for a new license, one municipal, one private, neither of which is the original licensee. If the plans submitted by the private utility are initially superior to those of the municipality, all parties agree that the preference provisions of Section 7(a) require that the municipality be granted a reasonable time to make its plans "equally well adapted." Thus, the preference provision must be applicable during the *process* of issuing a license, but *before* any issuance of the license.

The simple fact is that in any competitive licensing situation (the only situation to which Section 7 is addressed) at least one of the applicants must be a new applicant applying for a new license. Thus, in any competitive situation the Commission is determining whether to issue a license to a new licensee under Section 15 and if one of the applicants is a municipality the preference must be applicable. Once it is established that "in issuing" means "in determining whether to issue," the question argued at such length by petitioners both

here and below – the meaning of the words "new licensee" in Section 7(a) and Section 15 becomes irrelevant.[1]

Indeed, Utah Power, both an individual petitioner and a party to the Hydro Group Petition here, in its Petition for Rehearing to the Commission (R. 1285), accepted the Commission's interpretation of "in issuing" (set forth at 4 above) and, indeed, urged upon the Commission the interpretation of the words "in issuing" as meaning "in determining whether to issue."[2] The Hydro Group has acknowledged that Utah's interpretation (and more importantly that of the Commission) is fatal to the position of the private power companies (Reply Brief to the Commission, R. 924, emphasis added):

> Santa Clara's disingenuous attempt to substitute "in determining whether to issue" for the words "in issuing" . . . would (1) make the preference applicable in issuing [new] licenses to original licensees."

It is difficult to understand how the private power companies can seriously assert that their current interpretation of Section 7 is *the* plain meaning after one of their key members has urged upon the Commission an interpretation recognized by the others as utterly destructive of their position, four Commissioners of the Federal Energy Regulatory Commission

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[1] Although it is difficult to articulate any other meaning of "in issuing" in Section 7(a), it might be considered that "in issuing" refers to the conclusion of the decisionmaking process. This interpretation would still compel the same conclusion since preference operates to break a tie and therefore to control the decision upon the identity of the licensee. Thus, the result of applying preference as a tie-breaker would be "issuing licenses to new licensees."

[2] Utah stated (Petition for Rehearing at 25, R. 1285, emphasis added):

> The broader phrase *should* be interpreted consistently with Santa Clara's and the Commission's paraphrasing . . . *see* Opinion at 46, n. . 44 [quoted above at 4] as follows:
>
> in determining whether to issue licenses to new applicants under Section 15 hereof.

have been unable to find their interpretation plain, and three judges of the court of appeals have found the Commission's interpretation reasonable.

The court of appeals, in its treatment of plain meaning, was more than generous to the private companies. Their interpretation of the cross reference in Section 7(a) to Section 15, even if accurate, does not conflict with the interpretation of the Commission and of the public power entities. Therefore, the correct result should and could have been the plain meaning interpretation sought by the public power entities.

2. The "plain meaning" interpretation advanced by the private companies is not the plain meaning of Section 7(a)

a. The "plain meaning" interpretation advanced by the private companies is not derived from the unadorned wording of Section 7(a), but through the addition of limiting words not contained in that section.

The private companies contend, as they must, that the "plain meaning" of Section 7 is that preference shall be granted only when the sole possible outcome of the process will be the issuance of a license to a new licensee; in other words, when there is no possibility that the original licensee will receive the new license because the original licensee is out of the picture (PG&E Brief to the Court of Appeals at 14). Preference, they argue, would then apply in evaluating the applications of the other applicants for a new license. But it is equally inevitable that the outcome will be issuance of a license to a new licensee, both when the original licensee is no longer in the picture and when there is a tie between the application of the original licensee and that of the preference entity.

Even accepting the proposition advanced by the private companies that preference attaches at the point when the inevitable outcome will be the issuance of a license to a new licensee, that point will have been reached in both of the situations just described and there is no language in Section 7

that suggests the interpretation that it is reached only in the former instance.[1]

The private power interests do not specifically indicate *how* the words of 7(a) are to be plainly read to result in the interpretation they seek. They appear to read the language as though it said:

> . . . in issuing licenses to new licensees under Section 15 hereof, the commission shall give preference to applications therefor by States and minicipalities "only against applicants seeking the right to operate an existing project for the first time."[2]

We wonder whether the private power interests are even serious in claiming that their interpretation can be derived from the plain meaning of the Act. The Hydro Group has virtually acknowledged that it cannot be so derived. The Hydro Group stated (Brief to Court of Appeals at 16 n. 14, emphasis added) that:

> Section 7(a) *appears* to give municipal applicants at both initial and relicensing stages an opportunity to make their plans "equally well adapted." To the extent the application requires the Commission to provide time for a municipal to improve its plans, it would be applicable under either of the interpretations of Section 7(a) which are being advanced by the parties to this proceeding.

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[1] The fact of the matter, however, is that nothing in Section 7 indicates that the issuance of a license to a new licensee must be the sole possible outcome of the process of deciding among competing applications before the municipal preference is to be applied.

[2] The portion enclosed in quotation marks appears in the Brief to the Court of Appeals of Utah Power at 10. The position of the other private power companies is similar. PG&E reads the Section 7(a) language as saying "municipal preference applies only against new licensees and not against an original licensee seeking to relicense its existing project" (Brief to Court of Appeals at 11). The Hydro Group reads it to mean that "the relicensing preference does not apply against the original licensee, but applies only among competitors to acquire the project as new licensees" (Brief to Court of Appeals at 4).

But if the language of Section 7(a) is examined, it is undeniable that the opportunity for the preference entity to improve its plans to create the tie is only to be granted when the tie-breaking preference provision is applicable.

b. The interpretation of the private power interests treats the second preference of Section 7(a) as surplusage.

Section 7(a) of the Act contains two preferences. The first is the mandatory municipal preference, the second is a discretionary preference applicable to licensing competition between "other applicants" which permits the Commission to give preference to the applicant whose plans are "best adapted." Under the Commission's interpretation that Congress intended the first preference to apply to all contests involving a preference and a nonpreference applicant, the two preferences cover all competitive situations. Under the "plain meaning interpretation" of the private power companies, the Commission is given no standard as to choosing between a preference applicant and a nonpreference original licensee both seeking the new license. Yet, this was the most common situation which all interested parties – executive, congressional, and private power – expected to occur at the expiration of the original license. See pp. 17-19, *infra*.

The private power companies basically maintain that Section 10(a) of the Act provides the standard applicable in all cases. While that provision is not directed to competitive situations (see Joint Brief at 26-32), the fact remains that the Commission's interpretation provides meaning to the second preference contained in Section 7(a) while the private power companies' interpretation renders those 55 words entirely superfluous.

Even if careful analysis might disclose that Congress was wrong in believing that the second provision had meaning, the fact remains that Congress undoubtedly thought it had some meaning. Thinking it had some meaning, Congress would not have enacted it to cover the less likely situation where none of the applicants on relicensing were preference entities and

failed to provide any guidance in the more likely situation where one of the applicants was a preference entity.

The only sensible answer is that Congress did provide such a preference when it enacted the municipal preference.[1]

3. The "Plain Meaning" Advanced By The Private Power Companies Leads To Absurd Results.

As the private power companies have acknowledged (PG&E Pet. 69a), if their position is accepted, a municipality which is the original licensee seeking a new license would not enjoy a relicensing preference. The Commission found it "absurd to believe that Congress gave the States and municipalities *not in possession* a preference against citizens and corporations not is possession, without also giving States and municipalities *in possession* the same preference against citizens and corporations not in possession." (*Id.*) Thus, under the interpretation advanced by the private power companies, a municipality in possession is placed in an inferior position compared to the one it would enjoy if it were a newcomer to the project seeking a new license in competition with other newcomers. Under their view in such a situation a state or municipality – for whose benefit Congress enacted the preference – with an original license would have a lesser chance of obtaining a new license than if it had never held a license in the first place. The private power companies, *e.g.*, the Hydro Group (Pet. 20), contend that such a result is not absurd.

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[1] The Commission (PG&E Pet. 68a) concluded that "the second preference [of Section 7(a)] would be applicable to competition between States and municipalities *inter se*, as well as among citizens and corporations *inter se*. The first, or municipal preference would continue to be applicable to competition between States and municipalities, and citizens or corporations, completing the coverage of all the possible combinations of competitors." Thus, the Commission found that Section 7(a) provided a preference, either mandatory or discretionary, in all relicensing situations. The interpretation by the private power interests, however, would provide the Commission with no guidance only in the situation which Congress regarded as most likely to occur.

The Hydro Group indicates (Pet. 20), albeit in an attenuated form, that the original licensee does not need a statutory preference at the relicensing stage to obtain a new license if its past operation and future plans conform to the standards of the Act. In short, the private power companies believe that the original licensee must always possess the advantage provided it has not acted improperly. As they stated below (Brief of the Hydro Group to the Court of Appeals at 19-20), "the holder of an expiring license would have a natural preference on relicensing." Thus, to avoid the conclusion that their plain meaning interpretation leads to absurdity, the private power companies now create a natural preference enjoyed by the original licensee which is not expressed anywhere in the Act and which in more limited form had been stricken from the bill in the drafting process (PG&E Pet. 33a). Even assuming, *arguendo*, such a natural preference, the construction advanced by the private power companies would still leave a municipality holding the original license materially disadvantaged since it would no longer enjoy the right to make its plans "equally well adapted." Moreover, as the discussion in the Petition of Utah Power (at 17-20) convincingly demonstrates "The Municipal Preference Provides Significant Competitive Advantages."

B. The Historic Record Establishes That The Federal Water Power Act Was Intended And Understood To Provide A Municipality With A Preference On Relicensing Against An Original Nonpreference Licensee.

The cursory attacks contained in the petitions on the use of historical materials by the court of appeals and the Commission do not even begin to respond to the massive materials put before the Commission, relied upon by the Commission and concisely employed by the court of appeals.[1]

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[1] The petitioners main objection to the court's discussion of legislative materials, *e.g.*, Utah Pet. at 24, 26-27; PG&E Pet. at 14, 15; Hydro Group Pet. at 19, is that the court "ignored entirely" the "clear and compelling evidence" of the "repeated and consistent usage of the term 'new licensees.' " (Utah Pet. at 26-27). But, since that "fact" is irrelevant in interpreting the decisive words "in issuing," the alleged "failure" is equally irrelevant. See discussion at 4-8, *supra*.

In their Joint Brief to the court of appeals, the public power entities devoted over 60 pages (80-142) to an extended discussion of the historical record. That document responded to every argument raised by the private power companies. A careful review of the points now urged in their petitions indicated they raise no new arguments. The page limitations imposed upon this document preclude a full response now. In an attempt to provide the maximum information to this Court, we now summarize certain of the key items and provide references to the fuller treatment contained in the Joint Brief. These facts show that the Executive and the Legislature intended and understood that the Act provided municipal preference designed to apply in all relicensing situations, that the private power interests understood and accepted such a preference, that a learned district judge, who had himself been a senior member of Congress during the formative period of the legislation, concluded in 1922 that the Act provided such a preference, and that the initial statements of the newly-formed Federal Power Commission recognized the full extent of the preference. Taken alone, any single item outlined below would constitute compelling evidence of the legislative intent. Taken together, they are conclusive.

In considering certain of the points, the realistic impact of the positions taken by the contending interests must be evaluated. The full preference claimed by the public power interests means that when the plans of competing applicants are equally well adapted the preference entity will, if the license is to be granted, receive the license. Furthermore, if the filed plans of another applicant are initially superior, the preference entity must be given the opportunity to match the plans of the other applicant and, if it succeeds in matching those plans, it is to obtain the tie-breaking preference. The preference contended for by the public interests is obviously an extremely valuable right. The probability of municipalities seeking to exercise such a right would explain the repeated references by Administration figures, legislators and the early Federal Power Commission, as well as representatives of the private power interests, to the prospect of widespread municipal ownership of licensed hydroelectric projects after 50 years (see pp. 17-19, 22 *infra*).

It would also explain the exhaustive legislative sturggle and the hundreds of pages of testimony and congressional deliberations over the financial compensation to be received by the original licensee in the event of recapture.[1]

The private power interests, in contrast, describe a preference that is without practical significance. According to them, municipal preference is not applicable "against an original licensee seeking to relicense his existing project" (*e.g.*, PG&E Brief to the court of appeals at 11). Thus, municipal preference, according to the private power interests, is applicable only when the original licensee is not seeking a new license—in short, when the original licensee has concluded the project is worthless. Even in that situation, before the preference could assume any value, another nonpreference applicant must be competing with the preference applicant for the acquisition of the worthless project.

The private power interests cannot explain why their valueless preference was, somehow, of such importance that it would be mentioned, let alone emphasized by, *e.g.*, Merrill in his memorandum to the President (Item 7, *infra*), Congressman Lee is his summary of the Act to the House (Item 6), Merrill in his short 1920 magazine article (Item 8, *infra*) and by the full Commission in 1926, with the approval of the Department of Justice (Item 10, *infra*). The limited preference which the private power interests say was created is also totally inconsistent with the general expectation that in 50 years many states or particularly municipalities would obtain the licensed projects (see Item 4, *infra*).

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[1] The prospect of recapture by the United States under Section 14 could not explain the deliberations over compensation to be paid on recapture. It was widely recognized that the United States could only exercise its rights under Section 14 to recapture hydroelectric facilities if it were to utilize them for public purposes. Public purposes at that time were considered to be extremely limited and the prospect of recapture and use by the United States was considered remote. See the discussion on recapture by the United States appearing in Federal Power Commission, Sixth **Annual Report (1926)**, summarized under Item 9, *infra*.

Item 1: ***The Wilson Administration from 1914 on supported full municipal preference on relicensing.*** (For a fuller discussion see Joint Brief 60-69).

Senate Report No. 898, 63rd Cong., 3d Sess. (1915) contained the views of Secretary of the Interior Lane, who, speaking for the Wilson Administration, stated (at 11):

> Careful consideration has been given to the question of what period should be covered by such a permit or agreement, and the general consensus of opinion seems to be that 50 years is the proper one, having in mind the rights and interests of all concerned. *This, subject to renewal in the event that the Government and State or the municipality does not desire to take over the plant at the expiration of the original permit period, or for good and sufficient reasons it be not found advisable to renew the permit to the original permittee.*

The Administration, through Secretary Lane, was clearly stating that states and municipalities must have the right to take over a licensed hydroelectric plant at the termination of the initial 50-year term. The quoted paragraph clearly indicates that a nongovernmental licensee was not expected to obtain renewal if a state or municipality desired to take over the project.

The same thought was expressed more succinctly by O.C. Merrill, the principal Administration spokesman on water power, in his 1914 testimony (Hearings on H.R. 14893 before the House Committee on Public Lands, 63d Cong., 2d Sess. 417 (1914) ("1914 House Hearings"):

> With respect to the matter of renewal, I believe that provision should be made in any lease granted that the original lessee should have the right to renew except under two conditions, first, when the site is needed for public purposes, either by the nation, by a State, or by a municipality; second, when the lessee refuses to accept at the time of renewal, the conditions imposed on all other lessees.

Merrill was clearly stating that if a state or municipality seeks the project for public purposes, it, and not the original lessee, is to receive the lease [license].

Item 2: ***Merrill's original memorandum of the principles that were to be embodied in the Administration bill included the principle of full municipal preference on recapture.*** (For a fuller discussion and citations see Joint Brief 70-74).

Merrill drafted, on October 31, 1917, a "Memorandum on Water Power Legislation." The first page of that memorandum contains a handwritten notation: "This is the memorandum which led up to the preparation of the bill now before Congress." That memorandum stated in pertinent part (PG&E Pet. 32a-33a):

> At the termination of license United States to have right to take over the plant or plants covered by the license, or to transfer them to a State or municipal corporation applying therefor, upon payment of compensation to the original licensee; otherwise the original licensee to have preference right to renewal of license upon compliance with the conditions prescribed by then existing law and regulations.
>
> Licenses should terminate at the end of the fifty-year period in order that the United States may at that time dispose of the privileges as the public interest and the law and regulations then existing may require. In such disposition the order of preference should be as follows: (1) the United States – to acquire properties and operate them for Governmental purposes, (2) the State or municipality – to acquire the properties and operate them for municipal purposes, (3) the original licensee – to secure renewal of the license under conditions prescribed by then existing law and regulations, (4) any other applicant – under similar conditions. These provisions will leave the way open for future public ownership and operation if the experience of the next fifty years shall have established

> the wisdom of such a policy. In any event, freedom of action in this respect should not be fore-closed by legislation at the present time.

As the Commission stated:

> The memorandum was submitted to and approved by Secretary of Agriculture Houston, and submitted by him to President Wilson. The President approved the memorandum and gave instructions to the three Secretaries to draft a water power bill in accordance therewith.

(PG&E Pet. 33a).

Thus, it is clear that at its inception the Administration bill was intended to grant to states or municipalities a preference on relicensing. Thereafter, Merrill drafted a bill which granted a general discretionary licensing preference to states and municipalities and further provided that "the original licensee shall have a preference right over any other applicant therefor except a State or a municipality" (PG&E Pet. 32a). That quoted proviso was removed from the Administration bill prior to its introduction in Congress. However, in the Commission's language, "It is clear that Section 7 as introduced provided a discretionary suggestion of choice in favor of States and municipalities in all *re*licensing, as well as in all initial licensings" (PG&E Pet. 34a). That provision in Section 7 read (*Id.*):

> That in issuing licenses hereunder, the commission may in its discretion give preference to applications for licenses by States and municipalities for developing power for State and municipal purposes, provided the plans for the same are deemed by the commission to be adapted to conserve and utilize in the public interest the navigation and water resources of the region. . . .

It was this bill which, as summarized in the next item, was understood by the representatives of the private power interests to provide for a state or municipal relicensing preference against the original licensee.

Item 3. ***At the first and only extended congressional hearing on the Administration's water power bill in 1918, representatives of the private power interests clearly indicated recognition of a full municipal preference on relicensing.*** (For a fuller discussion and citations see Joint Brief 81-105).

During the 1918 hearings held before the House Committee on Water Power, representatives of the private power sector acknowledged their recognition of the fact that full municipal preference rights on relicensing were contained in the Administration bill. They did not take issue with this concept, but were primarily concerned with the right of an original licensee to compensation in the event of take over.

For example, the witness for the Pacific Gas and Electric Co. testified:

> . . . If he [the original licensee] is making a paying business out of it the Government *will undoubtedly give preference at the end of the time, if he is making good profit on it, to a municipality or somebody else who might want it and whom the Government preferred. . . .*

(Hearings Before the House Committee on Water Power, 65th Cong., 2d Sess. 236 (1918). ("1918 House Hearings") (emphasis added).

The significance of the acquiescence of the water power interests taken together with the Administration's strong support for the full preference right of municipalities was that there was no remaining opposition to the principle. With the acquiescence in that principle by the private power interests, who were far more concerned with obtaining legislation that would permit them to profit from hydroelectric facilities for an initial period of 50 years than they were with their vulnerability at the end of 50 years to a takeover, there was no organized group with an interest in preventing full municipal preference on relicensing.

Item 4. ***Witnesses representing the private power interests before the house water power committee in 1918 expressed their expectation that, at the expiration of 50 years, new licenses issued under section 15 would be obtained by states and municipalities and not the original licensees.*** (For a fuller discussion see Joint Brief 106-08).

During the 1918 hearings of the House Committee on Water Power, witness after witness representing the private power interests stated their expectation that at the end of 50 years a good many states and municipalities, rather than original licensees, would obtain the new licenses. A representative exchange occurred between Congressman Haugen and Mr. Krauthoff:

> Mr. HAUGEN. I think it is generally agreed there would not be any recapture; I do not think the Government is going to take any of these plants over.
>
> Mr. KRAUTHOFF. According to my judgment as a bond man, I would seriously question whether in 50 years a good many States or municipalities would not recapture under the licensee provisions of the bill. The present trend is in that direction.

(1918 House Hearings at 439.) Coupled with the expectation that states and municipalities would receive the new license in 50 years was a recognition both by members of the Committee and witnesses representing the private power interests that the United States was unlikely to exercise its rights under Section 14 to retake the properties for its own use.

The very extensive Congressional discussion and debate (which occupies most of the two volumes of Dove[1]) as to the compensation to be paid to an original licensee if its project

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[1] E. Dove, *Legislative History of the Recapture Provisions and the Net Investment Concept of the Federal Power Act* (2 vols. 1966) is an 848-page compilation (typically photocopied) of relevant extracts from the legislative history prepared for the Commission by an attorney on its staff. It includes a few mechanical comparisons.

was taken over was necessary precisely because of the general expectation that the matter of compensation had to be dealt with in order to assure investors that they would not lose their net investment and that it would be returned to them when, at the end of 50 years, states and municipalities successfully exercised their preference rights.

Item 5. ***The Senate amendment adding the words at issue to Section 7(a) was designed to clarify an already existing full municipal preference on relicensing.*** (For a fuller discussion see Joint Brief 115-26).

The addition by the Senate Commerce Committee of the words "in issuing licenses to new licensees under Section 15 hereof" was suggested by Gifford Pinchot, the politically influential president of the National Conservation Association, in his letter of June 25, 1919 to Senator Wesley L. Jones, Chairman of the Senate Commerce Committee. Pinchot wrote (PG&E Pet. 42a - 43a):

> The obvious intention of Section 7 is to give preference to States and municipalities; and you will not be accomplishing this purpose surely, unless you insert after the word 'issued' in line 11, page 12, of your bill, the words 'and in issuing licenses to new licensees under Section 15 hereof,' or word [sic] of like import.

Note that Pinchot is asserting a fact – the obvious intention of Section 7 is to give a full preference to states and minicipalities. In plain language, Pinchot is pointing out that Section 7 was intended to confer a full preference on relicensing and that Congress would not be accomplishing this purpose "*surely*" unless it added the language he suggested or words of like import.

This interpretation is strengthened by Senate Report No. 180[1] which (at 1) stated that most of the amendments it made to the House bill were ". . . of a minor character and largely make more clear and certain the meaning of the House

[1] Report of Senate Commerce on H.R. 3184, S. Rep. No. 180, 66th Cong., 1st Sess. (1919).

provisions." The House Report on the amendment described it as "clarify[ing]."[1] These official descriptions are accurate only if the bill, before the amendment contained a municipal preference on relicensing.

Item 6. ***Immediately before the final House vote on the water bill in 1920, Representative Lee, a member of the Conference Committee, informed the House of Representatives that states and municipalities were given a full preference on relicensing.*** (For a fuller discussion see Joint Brief 127-28).

After the Senate-House Conference Committee had resolved differences between the bills that had passed each body, Representative Lee informed the House on the very day that it took its final vote on the bill:

> In the development of water powers by agencies other than the United States, *the bill gives preference to States and municipalities over any other applicant, both in the case of new developments and in the case of acquiring properties of another licensee at the end of a license period.*

59 Cong. Rec. 6527 (May 4, 1920) (emphasis added). No Congressman or Senators intimated any contrary view.

Item 7. ***Merrill's memorandum to President Wilson informed the President that states and municipalities enjoyed a full preference on relicensing.*** (For a fuller discussion see Joint Brief 129-33).

Shortly before he signed the Federal Water Power Act, President Woodrow Wilson received from its principal arthitect, O.C. Merrill, a memorandum which clearly stated that the Act provided for municipal preference on relicensing:

> The United States has the first right to develop any power project, and it may exercise this right at any time, for any purpose, and to any extent that

[1] H. Rep. 910, 66th Cong., 2d Sess. 8 (1920).

> Congress may approve. For development by agencies other than the United States, preference is given to States and municipalities. *A similar preference is given for the acquisition of the properties of other licensees at the end of the license period.* (Emphasis added.)

O.C. Merrill, Memorandum on Water-Power Bill, H.R. 3184 (June 9, 1920) (see PG&E Pet. 45a-46a).

Note Merrill's explanation is unequivocal. It contains no indication of any limitation of the preference that would make it inoperative against an original licensee. Merrill's memorandum evidences no hesitation or doubt and contains no indication that the legislation could possibly have been intended to have or to be construed to have a different reading. This most informed official[1] is stating a fact, not resolving a dispute or ambiguity. Note, further, this memorandum, written after the conclusion of all congressional action, was to assist the President in his task of deciding whether to sign or to veto the Act.[2]

Item 8. ***In November, 1920, Merrill, as Executive Secretary, the highest ranking full-time official of the Federal Power Commission, publicly declared that there was a full municipal preference on relicensing.*** (For a fuller discussion see Joint Brief 134-37).

In a three-page article Merrill wrote (Merrill, *Benefits Accruing to Municipalities Through the Federal Water Power Act*, 23 The American City 476 (November, 1920) (emphasis added)):

> States or municipalities are given preferences in obtaining licenses and, with the exception of

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[1] See, *e.g.*, *United States* v. *Public Utilities Commission of California*, 345 U.S. 295, 305 n.10 (1953), where his testimony is cited as representative of the views of the Secretaries of Agriculture, Interior, and War.

[2] There had been vetoes of water power enactments by Presidents Roosevelt and Taft. The real possibility of a veto by President Wilson had been suggested during the legislative process. *See The Water Power Bill*, Washington Post, June 11, 1916. The President's decision to sign or veto the bill must be viewed as a crucial part of the legislative process.

> Government dams, are not required to pay rental charges for any power developed which is sold to the public without profit or is used for State or municipal purposes. States and municipalities are also preferred applicants for sites on which licenses have expired and may purchase the properties on the same terms as the United States itself.
>
> While no one can safely predict the trend of public ownership in the next fifty years, it is probable that the agency through which the public will most often act will be either the municipality or the state. Insofar as Federal legislation can do so, the Water Power Act provides the medium through which these agencies can secure the right to make use of the power sites under Government control. . . .

This statement is completely incompatible with the interpretation now put forward by the private power interests. A limited preference, of utility only if the original licensee regarded the project as worthless and did not choose to seek relicensing, certainly could not be described as "providing the medium through which those [preference] agencies can secure the right" to a license "insofar as Federal legislation can do so."

Item 9. ***In 1922, United States District Judge Clayton (better known for his legislative role in the passage of the Clayton Act) unequivocally stated that there was a municipal preference on recapture against the original licensee.*** (For a fuller discussion, see Joint Brief 137-38).

> United States District Judge Clayton declared:
>
> In further regard to the scope of the [Federal Water Power] act, the national policy expressed in it is that the United States may at the expiration of 50 years take over any water project constructed under the act, and that if the United States does not at the end of such period take over the project *the state or municipality under section 7 is given the preferential right over the original licensee to a renewal of the license.*

(*Alabama Power Co.* v. *Gulf Power Co.*, 283 F. 606, 617 (M.D. Ala. 1922) emphasis added). This contemporaneous interpretation of the Act by a learned judge, who was in a unique position because of his prior role as a congressional leader during the formative period of the legislation, is obviously entitled to great weight.

Item 10. ***In 1926, the Federal Power Commission and the Department of Justice approved a statement as to the importance of Section 7 in connection with the recapture provisions of Section 15 which is consistent only with the creation by Congress of a full preference upon relicensing and is totally inconsistent with the interpretation advanced by the private power interests.*** (For a fuller discussion see Joint Brief 139-41).

As appears in the Sixth Annual Report of the Federal Power Commission (1926) at 160-65, the Commission approved a letter for dispatch to the Honorable Charles Evans Hughes, who represented the State of New York, in which it expressed its "views." That letter had previously been referred to and approved by the Department of Justice. That Commission, composed of President Calvin Coolidge's Secretaries of War, Interior and Agriculture, men who would not ordinarily be assumed to be hostile to the interests of private investors, pointed out that it was "the opinion of the Commission" that the provisions of Section 14 of the Federal Water Power Act were not intended to be of themselves a grant of authority to the United States to acquire property. The Commission pointed out that unless Congress through constitutional amendment received authority to acquire property for other than governmental purposes, it could not exercise its rights under Section 14 except in those extremely limited instances in which the United States itself would utilize the hydroelectric power for its own governmental purposes. Thus, the Commission declared:

> The most important provisions of the Act with respect to recapture are, in fact, those contained in Section 15, which, in connection with the preference

> prescribed by Section 7, afford a means whereby the States and political subdivisions or agencies of the States may acquire, under terms not otherwise likely to be available, private properties maintained under license.

This nearly contemporaneous interpretation of the Act by the Commission, in a statement which had been "referred to and approved by the Department of Justice," supports only the interpretation that states and municipalities were granted a full preference on recapture. If the preference were as limited as the private utilities maintain, it would be as a practical matter useless. Municipalities would enjoy a preference only in those instances where the original licensee regarded the project as worthless and, therefore, did not seek relicensing *and* where another nonpreference applicant also sought this worthless license. It would be impossible to regard a provision which as a practical matter would be virtually useless, as the most important provision of the Act with respect to recapture or to state that it would permit the preference entities to acquire, under terms otherwise not likely to be available "private properties maintained under license."

Item 11. ***There are no contemporaneous statements whether by Congressmen, administration officials, the Commission, the courts, or even spokesmen for the industry indicating that Section 7 was intended to or did confer only a limited preference on relicensing.***

It was understood when the Act was passed that it conferred upon municipalities a full preference on relicensing. The absence of controversy on this point becomes clearest when the facts summarized in the first ten numbered items in this section are contrasted with the complete lack of citations by the private power companies to any statements indicating that Congress intended to confer or did confer only a limited preference on relicensing. In interpreting Section 7, this Court is not being called upon to deal with a disputed interpretation, but one which originally was clear to all informed parties. The representatives of the private water power interests recognized

the congressional intent to confer a full preference on relicensing and they accepted the full preference. There was literally no contemporaneous dispute over the fact that Congress enacted such a preference.

CONCLUSION

For these reasons, the petitions for a writ of certiorari should be denied.

Respectfully submitted,

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